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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 933

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, *et al.*,

Petitioners,

vs.

THE EVENING NEWS PUBLISHING COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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The Following Statutes Are Involved.

The Sherman Act—Secs. 1 and 2; Act of July 2, 1890, c. 647, secs. 1 and 2; 26 Stat. 209; 69 Stat. 282—15 U. S. C. A. secs. 1 and 2.

§ 1.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *"

§ 2.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punish-

ments in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209."

Act of July 2, 1890, c. 647, § 4, 26 Stat. 209; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167.

§ 4.

"The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; * * *"

Act of October 15, 1914, c. 323, § 16, 38 Stat. 737; 15 U. S. C. A., § 26.

§ 26.

"Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, * * *"

Question Presented.

The petition (p. 2) erroneously states that the question presented is whether a group boycott may constitute a *per se* violation of Section 1 of the Sherman Act in the complete absence of record evidence or court findings of the economic power of the boycotting group.

The evidence in the record amply reveals the economic power of the boycotting group. Both the trial court and the court below made findings as to (i) the total circulation of the respondent (R614a), (ii) the number of daily and Sunday papers boycotted by the Home Delivery Dealer (R624a) (hereinafter sometimes referred to as "Dealers"), (iii)

the growth in the membership of the Dealer's organization known as Allied Newspaper Carriers of New Jersey (R623a) (hereinafter sometimes referred to as "Allied"), (iv) the manner in which boycotts were imposed on respondent, i. e., as a result of agreement and combination by the boycotters (R631a), (v) the purpose of the boycott: the elimination of the newsboy as a competitor in the home delivery market (R625a-626a, 629a) and that (vi) the "restraint made itself felt to a substantial degree" (R626a). Record references in support of the foregoing findings appear in the Statement of the Case, infra.

The question presented is this:

Whether 133 Home Delivery Dealers acting pursuant to agreement among themselves to boycott and actually boycotting 32,000 daily newspapers of respondent carrying world-wide news and advertising out of a total daily circulation of 290,000, for the purpose of compelling the respondent to refrain from selling its papers to independent newsboys who competed with the boycotters constitutes a violation of sections 1 and 2 of the Sherman Act?

As to petitioners' reservation (footnote p. 2 of petition) to argue the question whether stoppage of local distribution of a newspaper constitutes a substantial restraint on interstate commerce in the instant case, it is submitted that this court has declared that the local dissemination of national and worldwide news and advertising falls within the purview of the Sherman Act. *Lorain Journal Company* v. *U. S.*, 342 U. S. 143, 151-152. See also *Times-Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594, 602, 603; *Hearst Publications* v. *N. L. R. B.*, 136 F. 2d 608 at p. 610; *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111.

In the event Certiorari is granted, respondent desires to argue in support of the judgment below that both the trial court and the court below erred in holding that the Dealers' conduct did not also constitute a violation of Section 2 of the Sherman Act. *Jaffke* v. *Dunham*, 352 U. S. 280; *U. S.* v. *Amer. Railway Express*, 265 U. S. 425.

Statement of the Case.

Petitioners are Home Delivery Dealers who purchase the respondent's newspapers and deliver them to their own customers. The dealers have their own delivery equipment, employ their own newsboys to service their customers and they fix their own price. The respondent has nothing to do with the price the dealer charges for the papers he delivers (R192a).

Prior to August, 1956, the petitioners were members of an unincorporated association known as "Associated Newspaper Carriers of New Jersey" (R379a). In midsummer of 1955, a group of dealers called on the respondent and insisted that all independent newsboys be withdrawn from the area served by the dealer (R196a, 209a). Demands for the removal of the independent newsboy from their territory were repeated from time to time thereafter. Such demands were at times coupled with demands for territorial allocation among the dealers and the elimination of the independent newsboy from such territory—in other words "zoning" (R91a).

On July 13, 1956, 19 dealers appeared at the office of the Circulation Manager of the respondent and demanded that the respondent cease selling its papers to the independent newsboys in their territory or else they would refuse to deal with the respondent (R92a, 145a-146a, 396a). Upon respondent's refusal to accede to this demand, the 19 dealers boycotted 15,000 of the respondent's papers daily from July 13, 1956 to July 28, 1956. During the 1956 boycott, the petitioners attempted to persuade large advertisers of the respondent to refrain from using the respondent's papers for advertising (R365a). This boycott ended on July 28, 1956. The petitioners claimed that the boycott was terminated by respondent's agreement to dry up the independent newsboys and to gradually eliminate them from the dealers'

territory (R450a-451a). The respondent denied that this was agreed to (R148a, 187a, 189a, 220a-222a, 282a-283a).

On August 23, 1956, shortly after the end of the boycott, 18 of the boycotting dealers organized themselves into "Allied Newspaper Carriers of New Jersey", a corporation, organized among other things "to act as a single unit or body in determining fair pricing and means and methods of delivery of newspapers * * *; to act in common concert for the individual financial betterment of each of its members * * *" (R47a). The membership of Allied is statewide (R47a) and is available to Home Delivery Dealers only, but not to newsboys (R108b). The initial membership of 18 grew to 40-45 by January, 1957 (R423a) and boasted 133 in May, 1957 (R430a).

After July 1956, several months of harmony ensued but in the latter part of 1956 the dealers boasting of an increase in their membership, renewed their demands for the removal of the independent newsboy from their territories (R287a). When this demand was again rejected by the respondent, the demand for zoning was renewed (R454a-456a) and when that was rejected, the members of Allied voted to boycott the respondent's papers. On May 20, 1957, 32,000 papers daily of the respondent were boycotted by the dealers. This boycott continued until it was enjoined by a preliminary injunction on June 18, 1957.

During this 1957 boycott, the dealers again circularized large advertising customers of the respondent and advised them that there were approximately 40,000 of the respondent's papers not being delivered (R442a-443a and R105b-106b).

The trial court found that the object of the dispute "is to force the plaintiff to eliminate the newsboy and thereby remove the competition which the newsboys create" (R627a-628a). The trial court also found "It is perfectly obvious from the concessions of the defendants, as well as from the

testimony in this case, that the dominant object of the combined refusal to handle plaintiff's newspaper was the elimination of newsboy competition in the distribution of plaintiff's paper to the homes and places of business of its readers within the areas of the Dealers' actual or contemplated operations'" (R629a). The trial court also found that the purpose of the concerted action of the 133 dealers "was the elimination of price competition presented by independent newsboys who operated in territories which the Dealers had arrogated to or obtained for themselves for the conduct of their business of delivering newspapers to the homes * * *" (R625a-626a) and that this was "apparent in the evidence and conceded by the defendants." (R626a).

The respondent's daily circulation amounts to 290,000 papers. Its Sunday circulation is 335,000. Respondent's facilities are capable of producing 150,000 more papers than are presently produced (R84a) and it has striven to increase its circulation because of the effect on advertising rates (R125a-126a). Home Delivery Dealers distribute 62,878 daily editions and 70,631 Sunday editions (R341a) of the total circulation or better than 20% of respondent's total circulation. At the time of the 1957 boycott Allied was still in its infancy. Not all dealers had joined it and the boycott, consequently, affected only 32,000 daily editions or approximately 50% of the total circulation controlled by Home Delivery Dealers. In 1957, the Dealers actually boycotted approximately 11% of the respondent's total circulation. The economic significance of this 11% of the circulation can be evaluated when it is noted that a 4% or 5% increase or decrease in circulation will affect advertising rates (R310a-311a) and that generally, advertising constitutes more than two-thirds of a paper's total revenues. *Times Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594, at p. 604.

The price that the Home Delivery Dealer charges his customer varies with each dealer and on occasion varies

with the customer, depending on accessibility and ease of delivery. The price varies from 50¢ to 68¢ for six daily and one Sunday paper (R130a). Most dealers charged an average price of 55¢ a week for the papers. The amount of money involved on an annual basis of the 32,000 boycotted papers is substantial; using an average weekly delivery price of 55¢, the dollar volume is $915,200 annually (32,000 x 55¢ = $17,600 x 52 weeks = $915,200). If all Home Delivery Dealers controlling a circulation of 62,878 daily papers had participated in the boycott, the dollar volume would be close to $1,800,000 annually and this is a fair projection because the purpose of Allied is to include all Home Delivery Dealers in its organization.

Petitioners' statement in the first footnote on page 9 of their brief that independent newsboys deliver 140,000 daily copies is not in the record below and is erroneous. But if we accept this figure as true, then the Dealers' purpose to eliminate independent newsboys becomes even more vicious and inadmissible as a restraint on commerce when it is noted that the circulation ascribed to the newsboy by the petitioners is almost 50% of the total circulation and the object of the boycott was to eliminate this means of distribution, ultimately affecting 50% of the total circulation.

The Home Delivery Dealer is an important segment of the means of distribution of respondent's paper available to the reading public and there is no policy of hurting him (R245a). It is the policy of the respondent to encourage Home Delivery Dealers to handle its papers (R197a). Respondent has turned over thousands of readers to the dealers and intends to continue to do so (R110a-111a, 199a). It is the publisher's concern "that our newspaper be available to whoever wants to read it, we maintain that we have the right to deliver our newspaper" (R203a). The dealer charges what he likes for the services he renders and this is also true of the independent newsboys (R208a).

Petitioners' assertion in the first footnote at page 6 of their brief that the dealers demanded the removal of the newsboys from their territories because they feared the News was attempting to replace them with newsboys is unsupported by the record. The dealers' circulation actually increased between 1950 and 1957. In April, 1950, the dealers throughout New Jersey bought 55,970 daily and 50,919 Sunday editions. In April, 1957, the dealers throughout New Jersey bought 62,878 daily and 70,631 Sunday editions, thereby showing an increase in business of approximately 7,000 daily and 20,000 Sunday editions (R340a-341a). The number of Home Delivery Dealers throughout this 7-year period remained about the same (R108a). The real basis for the two boycotts was not fear of loss of business but rather a desire to eliminate competition from the newsboys in the Home Delivery field.

Petitioners' statement at p. 5 that "the Association complained to the News that distribution of the papers was being made to the dealers after the newsboys (R620a-621a), thereby giving the boys a service advantage to offer prospective subscribers" is not true and petitioners' reference to R620a-621a is to the Court's opinion and does not support the assertion. Late deliveries to dealers were sporadic and were occasioned by a press break down or other events over which the respondent had no control. All these incidents were eliminated and press time for each edition was advanced one-half hour (R88a-89a, 159a). The record contains the testimony of only one dealer that the newsboys received papers before he did (R528a) but he admitted that this occurred because of the way the union truck driver ran the route and that the respondent could not change it because of the union (R530a).

The court below stated that the "facts found by the district court were mostly conceded * * *. In any event there is substantial support in the record for the court's fact findings which are set out in great detail in the opinion

below" (p. 45 petitioners' appendix). In view of the economic data in the record and findings of the trial court as well as the court below, we respectfully submit that the petitioners have created a straw man in stating in their "Question Presented" that there was "complete absence of record evidence or court findings of the economic power of the boycotting group."

Reasons Why the Writ Should Not Be Granted.

The instant case presents no novel factual or legal question. It is a classic example of a group refusal to deal with a person as a means of coercing him from dealing with other persons. This court has frequently held or declared that the restraints imposed by group refusal to deal are illegal *per se*. *Fashion Originators' Guild* v. *Federal Trade Com.*, 312 U. S. 457, 467-468; *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495, 522; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 214; *Times-Picayune Pub. Co.* v. *U. S.*, 345 U. S. 594, 625; *Northern Pac. R. Co.* v. *U. S.*, 356 U. S. 1, 5; *Klor's Inc.* v. *Broadway-Hale Stores, Inc.* —— U. S. —— 3 L. ed. 2nd 741 (Apr. 20, 1959, Advance sheets pp. 744-745).

The petitioners claim, however, that the *per se* illegality of the boycott as a violation of the Sherman Act loses its force "in the complete absence of record evidence or court findings of the economic power of the boycotting group." We submit that no decision of this court requires such record evidence; if it did, the *per se* doctrine would be meaningless. Indeed, the contrary has been held by this court. Thus, in *Northern P. R. Co.* v. *United States*, 356 U. S. 1, Mr. Justice Black said at p. 5:

> "However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and there-

> fore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing. United States *v.* Socony-Vacuum Oil Co., 310 U. S. 150, 210, 84 L. ed. 1129, 1161, 60 S. Ct. 811; division of markets, United States *v.* Addyston Pipe & Steel Co. (C. A. 6 Tenn.), 85 F. 271, 46 L. R. A. 122, aff. 175 U. S. 211, 44 L. ed. 136, 20 S. Ct. 96; *group boycotts,* Fashion Originators' Guild *v.* Federal Trade Com., 312 U. S. 457, 85 L. ed. 949, 61 S. Ct. 703; and tying arrangements, International Salt Co. *v.* United States, 332 U. S. 392, 92 L. ed. 20, 68 S. Ct. 12." (Italics ours.)

As recently as April, 1959, this Court said in *Klor's*:

> "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' Fashion Originators' Guild *v.* Federal Trade Com., 312 U. S. 457, 466-468, 85 L. ed. 949, 953-954, 61 S. Ct. 703. Cf. United States *v.* Trenton Potteries Co., 273 U. S. 392, 71 L. ed. 700, 47 S. Ct. 377, 50

A. L. R. 989. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in Kiefer-Stewart v. Seagram & Sons, 340 U. S. 211, 213, 95 L. ed. 219, 223, 71 S. Ct. 259, 'Such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.' Cf. United States v. Patten, 226 U. S. 525, 542, 57 L. ed. 333, 341, 33 S. Ct. 141, 44 L. R. A. N. S. 325." 3 L. ed. 2d at p. 744.

But even if the *per se* doctrine required record evidence of the economic power of the boycotting group, we submit that such a requirement was satisfied in the instant case. Both the trial court and the Court of Appeals found that the 1956 boycott affected 15,000 daily papers and that the 1957 boycott affected 32,000 papers. The relationship between the boycotted papers to the total circulation of 290,000 daily papers also appears in the record. The record also shows the effect of a 5% increase or decrease in circulation on advertising rates and that the dealers sought to influence large advertisers from dealing with respondent. The record is replete with evidence that the dealers' purpose in imposing the boycott was to eliminate the newsboy as a competitor or to bring about an allocation of territory that would ultimately bar the newsboy as a competitor.

The fact that the respondent did not submit to the dealers' demands does not prove that the boycott was lawful. The legality of a boycott is not measured by its results; the boycott is illegal even though it has not yet successfully attained its end. *Lorain Journal Company* v. *United States of America*, 342 U. S. 143 at 153. The Sherman Act is prophylactic as well as remedial. Petitioners' notion that there must be "broad economic and financial strength effectively to oppose the boycotted party or to maintain efficient control of the various elements of the boy-

cotting group" (p. 10—petitioners' brief) finds no support in the cases and the notion rests on the basic fallacy that the boycotting group must have sufficient strength to attain the objective of the boycott, otherwise the boycott is legal. Such a notion would permit a multitude of restraints already declared illegal by this court in cases where the restraints on commerce did not completely destroy the commerce involved. Cf. *Eastern States Retail Lumber Dealers Assn.* v. *U. S.*, 234 U. S. 600; *Fashion Originators' Guild* v. *Federal Trade Com., supra*; *U. S.* v. *Women's Sportswear Mfg. Assoc.*, 336 U. S. 460; *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218; *Mandeville Is. Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219.

When petitioners say at p. 12 that the concerted action in boycotting the respondent "may well indicate nothing more than continued voluntary desire in each member to pursue the collective goal" to make this court believe this was unconscious parallelism without disciplinary sanctions to compel conformance, they have deliberately overlooked (i) their express agreement and concerted action in the boycott in 1956, (ii) the unanimous "strike vote" they took to boycott the respondent in 1957 (R237a-239a, 270a, 423a), (iii) the unanimous agreement not to deal with the respondent from May 20, 1957 to June 18, 1957 (R429a-431a); and this by some dealers who had no boys in their territories (R562a). They have also shut their eyes to the purpose for which Allied was formed as expressed in its Certificate of Incorporation. Petitioners have also ignored the concession they made at the trial level that the "actions and refusals to deal complained of by the plaintiff resulted from an agreement and combination of the individual defendants [Dealers] through their membership in the corporate defendant [Allied]" (R613a), just as they have ignored the Court's finding that the object of the boycott was to force the plaintiff to eliminate the newsboy and thereby remove the competition which the newsboys created. We are puzzled by petitioners' oblique philosophical argu-

ment that it is inferrable that there was no agreement to boycott in view of the record evidence and concessions.

The record amply supports the court's findings that "the restraint made itself felt to a substantial decree" (R626a). The amount of commerce controlled by the boycotting dealers in the case at bar was on the rise, having doubled in less than one year since the organization of Allied whose potential had not yet been fully realized when the boycott of 32,000 papers was enjoined. To call Allied a "modest enterprise" and the boycott of 32,000 papers daily "feeble attempts * * * to make their feeble protests effective" is pure phantasy. The amount of commerce involved in the case at bar is as substantial as the $500,000 worth of salt involved in *International Salt Co.* v. *U. S.*, 332 U. S. 392 or the 5,000 taxi cabs in the four cities involved in *U. S.* v. *Yellow Cab Co.*, *supra*, or the 50% of the sportswear controlled by the stitching contractors in Boston, which city ranked fifth in the stitching contracting market in *U. S.* v. *Women's Sportswear Mfg. Assoc.*, 336 U. S. 460.

The latest declaration of this Court in *Klor's* v. *Broadway-Hale*, *supra*, does not require a showing of power in the boycotting group. Reference to Judge Barnes' opinion in *Klor's* in 255 Fed. Rep. 2nd 214 at p. 223, shows that there were many other widely advertised competitive brands available to Klor's which Klor's could have purchased to keep its business going without handling the boycotters appliances. Under these circumstances, the boycotters did not have the power to put Klor's out of business; yet this court found that the restraints imposed by the boycotters were at war with the Sherman Act. The test was not whether Klor's could survive in view of the restraints imposed upon it, but whether the restraints took from Klor's its freedom to buy appliances in an open competitive market. In the case at bar, the dealers' boycott would deprive the reading public of its freedom to buy from a newsboy and would prevent the respondent from selling

its papers to anyone but dealers in the home delivery market. The rule for which petitioners contend would require an investigation into the financial strength of the boycotted person to see if he could survive the boycott. This suggestion demonstrates its own absurdity and would establish one rule for the strong and another rule for the weak, and the legality of the conduct of the boycotters would depend upon the end result of the boycott rather than upon the means employed and its effect on interstate commerce. The Sherman Act condemns all combinations and conspiracies which restrain the free and natural flow of trade in interstate commerce, and the condemnation does not depend on the success or expectation of success of the boycotters.

We respectfully reiterate that the legal issues before the District Court and the Court of Appeals for the Third Circuit have been definitely established by the prior pronouncements of this Court; that the case at bar is a factual one; that the record below adequately and fully supports the findings of fact by the trial judge and that there has been a proper application of the rules established by the prior decisions of this Court to the proofs in this case.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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